



UTAH'S WATER

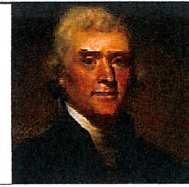
PROTECTING SOVEREIGN STATE'S RIGHTS
& PRIVATE PROPERTY

UTAH COMMISSION ON FEDERALISM

Randy N. Parker
Utah Farm Bureau Federation



Thomas Jefferson
Third President of the U.S.



“When the people fear the government, there is tyranny; When the government fears the people, there is liberty.”

THE ISSUES

Federal Water Claims
Regulatory Overreach
Defacto Federal Water Rights

“GRANTING WATER TO THE STATES”

History of Congressional Actions

Act of July, 1866 – “Recognizes priority of possession”

Desert Land Act of 1877- “Surplus water free for appropriation”

Taylor Grazing Act of 1934 – “Shall not diminish possession”

McCarran Amendment of 1952- “Waives U.S. sovereign immunity”

FLPMA of 1976 – “All actions by the Secretary are subject to valid existing rights”

Act of July 26, 1866

PRIORITY OF POSSESSION

*“Whenever, **by priority of possession**, rights to the use of water for mining, agriculture, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws and decisions of courts, **the possessors and owners of such vested rights shall be maintained and protected**”*

(43 USC Section 661)

The Desert Land Act of 1877

STATES SHALL APPROPRIATE WATER

"All surplus water over and above such actual appropriation and use....shall remain and be held free for appropriation and use of the public for irrigation, mining and manufacturing..."

The Taylor Grazing Act of 1934

RIGHT OF POSSESSION

"nothing in this Act shall be construed or administered in a way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing and other purposes..."

The McCarran Amendment of 1952

STATES ARE SUPREME

“waives the sovereign immunity of the United States for adjudications for all rights to use water.”

Federal Land Policy Management Act of 1976

HONOR EXISTING RIGHTS

“All actions by the Secretary concerned under this act shall be subject to valid existing rights.”



CONGRESSIONAL INQUIRIES

“Western Water Rights”

United States House of Representatives

April 25, 2013 – Natural Resources Subcommittee on Water & Power

“Federal Impediments to **Water Rights**, Job Creation & Recreation”

October 10, 2013 – Natural Resources Subcommittee on Water & Power

H.R. 3189 sponsored by Representative Scott Tipton (R-CO) “The **Water Rights Protection Act**”

June 24, 2014 – Natural Resources Subcommittee on Water & Power

“New Federal Schemes to Soak up Water Authority: Impacts on States, **Water Users** & Jobs”

August 6, 2015 – Oversight Subcommittee on Interior

“Threats to Grazing (Access & **Livestock Water Rights**) from Federal Regulatory Overreach”

May 18, 2017 – Natural Resources Subcommittee on Water, Power & Oceans

Discussion Draft – **Water Rights Protection Act of 2017** sponsored by Representative Scott Tipton



President Donald J. Trump

April 25, 2017

Presidential Executive Order:

“Promoting Agriculture and Rural Prosperity in America”

Section 4 (ix) **ensure that water users' private property rights are not encumbered when they attempt to secure permits to operate on public lands;**

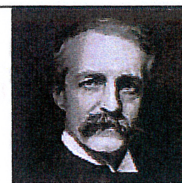
AGENCY ACTIONS AND OVERREACH “FEDERAL BULLYING”



United States Forest Service

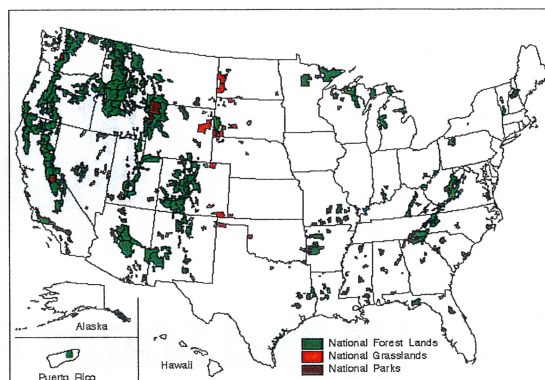
“WATER CLAUSE, OVERFILING & DILIGENCE CLAIMS”

Gifford Pinchot First Chief of the US Forest Service



1907

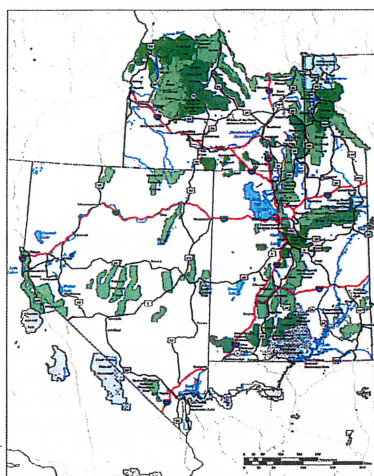
“The creation of the National Forest has **no effect** whatever on the laws which govern the appropriation of **water**. This matter is governed entirely by State and Territorial law.”



Forest System Lands

ACCORDING TO CHIEF TOM TIDWELL THE U.S. FOREST SERVICE CONTROLS:

- **14%** OF UNITED STATES WATER SUPPLY
- **50%** OF WESTERN UNITED STATES WATER SUPPLY



Intermountain Region

- MORE THAN 75% OF UTAH'S AVAILABLE WATER SUPPLY

Harv Forsgren Intermountain Region Forester



"It is **Forest Service policy to claim water rights** for water used by permittees, contractors and other authorized users of the National Forest System..."

"The Forest Service believes water resources used to water permitted livestock are integral to the land, **therefore the United States should hold the water rights** for current and future permitted grazing."

2012 TESTIMONY BEFORE THE HOUSE SUBCOMMITTEE ON NATIONAL PARKS, FORESTS AND PUBLIC LANDS



Manual - Water Uses and Development

Section 2541.32

"Claim possessory interest in water rights in the name of the United States for water uses on National Forest System lands as follows:

"Claim water rights for water used directly by the Forest Service and by the general public on the National Forest System.

"Claim water rights for water used by permittees, contractors, and other authorized users of the National Forest System, to carry out activities related to multiple use objectives. Make these claims if both water use and water development are on the National Forest System and one or more of the following situations exists:

- a. National Forest management alternatives or efficiency will be limited if another party holds the water right.
- b. Forest Service programs or activities will continue after the current permittee, contractors or other authorized user discontinues operations."



June 2004 – "Water Clause"

" any right to divert water from permitted NFS land where the use of water is on the same permitted NFS land shall be applied for and held in the name of the United States and the holder (hereinafter called "joint water rights")

In the event of revocation of this permit, the United States **shall succeed to sole ownership of such joint water rights."**

December 2015: “SUFFICIENCY AGREEMENT”



Demonstrate sufficiency of water to operate the permitted ski area before permit issuance.

1. Document a sufficient quantity of water.
2. Offer original water rights to the succeeding permit holder upon permit termination or revocation.
3. Requires the holder to offer to **sell water rights held jointly by the United States at market value to the United States.**

****Water clauses for special uses other than ski areas are not affected by this final directive.**

Utah “Diligence Claims”



US FOREST SERVICE:

- Filed more than 16,000 diligence claims on livestock water rights.
- Awaiting adjudication by the Utah State Engineer.

Regional Forester Harv Forsgren in 2012 testimony before Congress:

****“these diligence claims are made on behalf of the United States, which was the owner of the land where livestock grazed prior to statehood and livestock watering took place which action established the federal government’s claim to water rights.”**

Intermountain Region Guidance



Intermountain Region Guidance / August 2008:

"The United States may claim water rights for livestock use based on historic use of the water.

***Until a court issues a decree accepting these claims,** it is not known whether or not these claims will be recognized as water rights."*

*"The Intermountain Region **will not invest in livestock water improvements, nor will the agency authorize water improvements** to be constructed or reconstructed with private funds **where the water right is held solely by the livestock owner.**"*

Defacto "Federal Water Rights"



US FOREST SERVICE & BLM

Systematic Dismantling of Grazing Rights on Western Public Lands through **AUM cuts , Access Limitations and Water Challenges**

UTAH:

- Forest Service & BLM **cut or suspended use** of more than 4 million grazing AUMs between 1950 to 2012 (**70+% cut!**)

Tooele County Grazing Association

US FOREST SERVICE

- **"Change of Use" Applications** – Authorizing FS to determine where livestock water would be available.

IF YOU DON'T:

- Non-compliance could **"adversely affect turn-out."**



Wayne County

US Forest Service files a **"SUBBASIN CLAIM"** to Consolidate Diligence Claims:

- **204** Individual Water Rights
- **114.5** acre feet of water
- **8,114** Equivalent Livestock Units (ELUs)!



BLM Water Rights Policy



As Outlined in:

United States Department of the Interior, Bureau of Land Management

Manual Transmittal Sheet

7250 - Water Rights - 3/19/1984

#4 Acquire and/or Perfect Water Rights - Acquire and perfect the water rights necessary to carry out public land management purposes through state law and administrative claims procedures unless a federal reserved water right is otherwise available....

Utah Legislature 2008 & 2014

UTAH LIVESTOCK WATER RIGHTS ACT - CODIFIED IDAHO'S JOYCE DECISION:

S.B. 274 Livestock Water Rights Act as Amended Provided:

Clearly defines a beneficial user as the livestock permittee / Not a land management agency.

Provides a right of access to beneficially use, develop, and maintain the livestock water right.

Reiterates livestock water rights of the beneficial user are **appurtenant to the allotment.**

Deletes reference to "Certificate of Joint Ownership."

Determines that **unused or abandoned livestock water rights on the public domain shall be held by the State of Utah** until they are awarded to a livestock operation.

Requires a study of the state's jurisdiction over water rights including conflicts between local interests and the federal government and to determine what actions would be needed to maintain and defend state jurisdiction over water rights.

BLM EMPLOYEE POWERPOINT PRESENTATION



RESPONSE to Utah Senate Bill 274

"UTAH LIVESTOCK WATER RIGHTS ACT"

Effects of senate bill 274



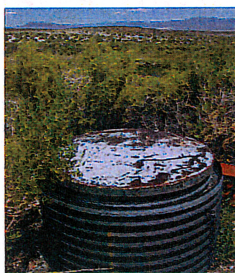
- Took effect May 13, 2014
- **No affect** on existing BLM rights, except for changes
- **No affect** on BLM rights for other uses such as fire, wild horses, recreation, wildlife.
- The **permittee consent** required for changes to BLM water rights **doesn't** create a **permittee interest in right**.

Applies to only a very small portion of water rights



SB 274 **does not apply to diligence claims**, which confirm historic pre-statutory waters (pre-1903 surface water rights and pre-1935 groundwater rights)

HB 274 does not apply to water user claims in adjudications, if claim is based upon use established prior to May 12, 2009



BLM must have a water right before funding and authorizing Water developments



1. BLM Utah **will not provide funding** for new developments that are not supported by a BLM water right.
2. BLM Utah **will not authorize Cooperative Range Improvement Projects** that are not supported by a BLM water right.

Options for obtaining a water right



1. **Change application** on BLM right in another location
2. Change application on BLM right that **doesn't include livestock use**
3. Acquire a water right in a **land tenure adjustment**, then change to livestock use
4. File an application for **another beneficial use** of the development: **wildlife, wild horses, recreation, etc.**



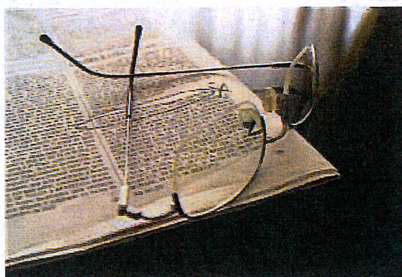
IF A CHANGE APPLICATION ISN'T POSSIBLE, WHAT ARE MY Other water right options?



1. **Permittee can elect to deed** part of private right to BLM.
2. **If permittee wants to entirely fund** a development where **water will be primarily for benefit of private lands**, then BLM **may** issue a **right-of-way grant**.
3. Field office may seek written exception from USO, if development is necessary for protection of critical resources, such sensitive species or cultural resources.



Other actions necessary to implement instruction memorandum 2015-19



Regular and careful review of applications filed by third parties.

- Each FO should have designated person review notices on a weekly basis.

Protest any individual permittee applications for livestock rights on public lands.

- Permittees may not be aware of new law or new BLM policy.
- Permittees may make incorrect land ownership statements.

Why do we protest private applications?



***BLM seeks to hold water rights for grazing allotments into perpetuity.**

If water rights are in private hands, BLM can't guarantee water availability for future permittees.

***Privately held water rights create an administrative headache if permit is transferred in the future.**

***Permittees may attempt to use privately owned water rights to get leverage in allotment management decisions.**

Other actions necessary to implement instruction memorandum 2015-19



Notify USO hydrologist and range lead when:

- your office files a change application or new application for a complementary use (wildlife, recreation, etc.)
- you observe an application filed by a permittee

***Do not expend funds on a range improvement project prior to receiving approval of the water right application or change of use application**

WHERE'S THE LINE?





CONSTITUTIONAL PROTECTION

United States Constitution

Protects citizens against:

“government taking of private property without just compensation and due process”

Utah Constitution

Protects citizens against:

“government taking of private property or diminishment of value without just compensation and due process”

WHERE'S THE LINE?



United States Constitution

Tenth Amendment:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.”

CASE LAW



United States Supreme Court

Tarrant Regional Water District vs. Hermann (2013) - SCOTUS concurred with Congress on the matter of water and the sovereign rights of the states:

"The power to control public uses of water is an essential attribute of [state] authority."



SCOTUS SETS FEDERAL LIMITATIONS

Solid Waste Agency of Northern Cook County (SWANCC) vs. U.S. Army Corps (2001)

SCOTUS in the Army Corps/EPA controversial “migratory bird rule” seeking to expand regulatory reach under the Clean Water Act said:

“Where an administrative interpretation of a statute invokes the outer LIMITS of Congress’s power, we expect a clear indication that Congress intended that result. This requirement stems from our prudential desire not to needlessly reach constitutional issues and our assumption that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority. This concern is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon TRADITIONAL STATE POWERS.”

Joyce Cattle Co. vs. United States (2007)

Idaho Supreme Court (2007) - Opinion No. 23 Defined “Beneficial Use”

“The District Court held that such conduct did not constitute application of the water to beneficial use under the constitutional method of appropriation, and denied the claimed rights. The Idaho Supreme Court concurred holding that because the United States did not actually apply the water to a beneficial use the District Court did not err in denying its claimed water rights.”

CONGRESS MOVES TO PROTECT LIVESTOCK WATER RIGHTS



HOUSE COMMITTEE ON
NATURAL RESOURCES
NATURALRESOURCES.HOUSE.GOV | CHAIRMAN ROB BISHOP

“THE WATER RIGHTS PROTECTION ACT”

Sponsor: Scott Tipton (R-CO)

113th Congress

-Prohibits **“Water Clause”** and imposing **“Joint Ownership”** of water rights as a condition of permitted activity.

114th Congress

-**Stops the implementation** of federal groundwater resources management scheme (GROTUS)

115th Congress House Subcommittee on Water, Power & Oceans

May 18, 2017

Testimony on the Discussion Draft of H.R. 2939

(Rep. Scott Tipton), To prohibit the conditioning of any permit, lease, or other use agreement on the transfer of any water right to the United States by the Secretaries of the Interior and Agriculture, and for other purposes. *"Water Rights Protection Act."*



SCOTUS



In Chief Justice Roberts' analysis of the structure of government as envisioned by the Framers:

'The States are separate and independent sovereigns.

Sometimes they have to act like it.'



Thank you